EDITOR'S NOTE

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No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

against

NEW YORK MEDICAL COLLEGE, INC., KARL P. ADLER, M.D., PHILIP HENIG, M.D., and KURT ALTMAN, M.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

(PROFESSOR) CYRIL C. MEANS, JR.
Counsel for Petitioner
New York Law School
57 Worth Street
New York, NY 10013
(212) 431-2198

December 3, 1987

QUESTIONS PRESENTED

(1) Was New York Medical College, by reason of its affiliation agreement with the New York City Health and Hospitals Corporation (HHC) in regard to the City-owned Metropolitan Hospital, a State actor, for Fourteenth Amendment purposes, so that it was not free to discriminate against petitioner by discharging him in violation of that Amendment's Equal Protection Clause?

(2) If the answer to Question (1) is Yes, did the Medical College's discharge of petitioner, if motivated by discrimination against him because he is a heterosexual, violate the Equal Protection Clause?

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Petitioner, Stanislaw Konarski, M.D., respectfully requests that a writ of certiorari issue to review the judgment of the New York Supreme Court, Appellate Division, First Department, entered in this proceeding April 7,

1987 (App. 13a-14a). The Appellate Division's action, an affirmance without opinion, is reported at 129 A.D. 2d 1018, 513 N.Y.S. 2d 905 (1st Dep't 1987).

The judgment it affirmed (App. 9a-12a) was entered November 19, 1985, upon an opinion filed October 7, 1985, by Eugene R. Wolin, a Justice of the New York Supreme Court, New York County, Special Term, Part I. This opinion (App. 1a-8a) was published only in the New York Law Journal, vol. 194, no. 77, October 18, 1985, p. 12, col. 2.

The Appellate Division denied a motion for leave to appeal to the Court of Appeals on June 9, 1987 (App. 15a-16a).

Acting pro se, petitioner filed in the New York Court of Appeals a motion for leave to appeal to that Court, which that Court denied (App. 17a-18a) on September 15, 1987, without opinion. This denial is reported at 70 N.Y. 2d 606. 514 N.E. 2d 388, 519 N.Y.S. 2d xcvii (1987).

JURISDICTION

The judgment of the New York Court of Appeals was entered on September 15, 1987. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1 (two clauses):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;
>
> nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Health and Hospitals Corporation Act,

N.Y. Laws 1969, ch. 1016,

§§ 2 (in fine), 4(1), 5(8), 6(1)(a, b),

65 McKinney's (Unconsolidated Laws)

§§ 7382 (in fine), 7384(1), 7385(8), 7386(1)(a, b)

(copies at pp. 19a-27a of Appendix herein).

STATEMENT OF THE CASE

Petitioner, a physician, was employed at Metropolitan Hospital -- a municipal hospital then and now owned by New York City -- from 1958 to 1981. Between 1958 and 1968 he was employed by the City, which then itself administered Metropolitan Hospital. Between 1968 and 1981 he continued to perform the same services at Metropolitan Hospital, but, during this period, his employer was New York Medical College, a private corporation, which administered Metropolitan Hospital under a series of affiliation agreements, at first with the City, and then with the New York City Health and Hospitals Corporation (HHC), a public benefit corporation created in 1969 by State statute (N.Y. Laws 1969, ch. 1016, 65 McKinney's N.Y. Unconsolidated Laws §§ 7381-7406 (1979)). The sections of this statute -- the New York City Health and Hospitals Corporation Act, herein after cited appear at pp. 19a-27a of the

That statute provides that "the exercise by such corporation of the functions, powers and duties hereinafter provided constitutes the performance of an essential public and governmental function (§ 2 (in fine); § 7382 (in fine)). The act declared HHC "a body corporate and politic, constituting a public benefit corporation" (§ 4(1); § 7384(1)), whose board of directors consisted entirely of City officials and mayoral appointees. The statute directed the City expeditiously to enter into contracts with HHC "whereby the corporation shall operate the hospitals then being operated by the city" (§ 6(1)(a, b); § 7386(1)(a, b)).

The clause authorizing HHC to enter into affiliation agreements with private corporations such as New York Medical College whereby the latter would operate municipal hospitals such as Metropolitan is found in the section enumerating corporate powers, i.e.,

"To provide health and medical services for the public directly or by agreement or lease with any person, firm or private or public corporation or association, through and in the health facilities of the corporation . . . " (§ 5(8); § 7385(8)).

The affiliation agreement between HHC and New York Medical College which was in force in 1981 at the time of petitioner's discharge contained a clause (§ 5.07) which in relevart part provided:

> The Affiliate [i.e., New York Medical College] agrees that it will not discriminate against any employee or applicant for employment or promotion because of age, race, creed, color, sex, sexual orientation, or place of national origin, and will abide by the Corporation's rules and regulations concerning non-discrimination.
>
> (R. 270 (emphasis added))

In his deposition, taken at respondents' instance, petitioner referred to the foregoing clause in his testimony as follows:

> The City has got a rule that if it gives a contract to somebody to do certain work for the City as in the

> case of New York Medical College doing work for the City and providing medical staff for Metropolitan Hospital, that New York Medical College will not discriminate.
>
> (R. 673)

Notwithstanding this clear text, the courts below made no reference to it. The trial court was the only one that wrote an opinion. In his order entered November 22, 1985 the trial judge recited that he had read the "exhibit attached" to the "reply affidavit of Marc Weinberger" (R. 6). Marc Weinberger was the senior associate dean of New York Medical College in charge of affiliations. The exhibit attached to Dean Weinberger's affidavit, which Justice Wolin recited that he read, contains the affiliation agreement in which the above quoted § 5.07 appears.

In the fiscal year in which petitioner was discharged, HHC's spending rate on Metropolitan Hospital, under HHC's affiliation agreement with New York Medical College, was $11,000,000 (R. 230).

Despite the nondiscrimination clause in the affiliation agreement, HHC, as of June 30, 1981, discharged plaintiff in pursuance of discrimination against him, because of his heterosexual orientation, by a homosexual clique.

In June 1984 petitioner brought suit against New York Medical College and three doctors at Metropolitan Hospital involved in his discharge (Drs. Adler, Henig, and Altman). These four defendants are still in the case, and are respondents herein. Originally there were also three other defendants (HHC, Metropolitan Hospital Center, and Richard D. Levere, M.D.). The trial judge dismissed them from the suit.

Respondents, in an identical paragraph 58 of their verified answers (R. 57, 73, 88, 103), all pled:

> The Medical College, as a private employer, employed plaintiff on a part-time basis from March 11, 1968 through June 30, 1981.

In his opinion filed October 7, 1985, Justice Wolin accepted respondents' contentions and granted their motion for summary judgment.

In one passage, he ignored § 5.07 of the affiliation agreement, writing:

> Plaintiff's reliance upon the affiliation agreements between HHC and the [New York Medical] College is misplaced. Nothing in those agreements relates to the terms and conditions of his employment.
>
> (R. 11; App. 4a)

Another passage in his opinion is fraught with mistake:

> While plaintiff's private sexual practices emjoy a measure of protection from government regulation (People of the State of New York v. Onofre, 51 N.Y. 2d 476 [1980]), that protection has not been extended to eliminate discrimination in the employment practices of private industry.
>
> (R. 11; App. 4a)

The Onofre case was about sexual acts, not sexual orientation. The instant case is about sexual orientation, not sexual acts.

More important, however, is the trial court's mischaracterization of New York Medical College, in regard to its employment practices at Metropolitan Hospital, under its affiliation agreement with HHC, as a "private industry". In respect of those matters, the Medical College is a State actor, bound by the Fourteenth Amendment's Equal Protection Clause. Once this is realized, the remainder of Justice Wolin's opinion, though it contains many statements of law that are correct (e.g., New York has not recognized a cause of action for wrongful termination of an employment at will: either party may terminate it for any reason or none) becomes irrelevant. Those statements pertain to State law, as applied to private parties, not to State actors under the Fourteenth Amendment.

The balance of this petition will discuss the two Questions Presented (State action & scope of equal protection) and a third Reason for Granting the Writ.

(1)

WAS NEW YORK MEDICAL COLLEGE, BY REASON OF ITS AFFILIATION AGREEMENT WITH HHC IN REGARD TO THE CITY-OWNED METROPOLITAN HOSPITAL, A STATE ACTOR, FOR FOURTEENTH AMENDMENT PURPOSES, SO THAT IT WAS NOT FREE TO DISCRIMINATE AGAINST PETITIONER BY DISCHARGING HIM IN VIOLATION OF THAT AMENDMENT'S EQUAL PROTECTION CLAUSE?

Three leading precedents of this Court, all brought to the attention of the courts below, are applicable: Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Perry v. Sindermann, 408 U.S. 593 (1972); and Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

Burton turned on the Equal Protection Clause; the two later cases on the Due Process Clause. They involved discharges from employment; Burton did not. In Burton and Perry, the challenger won; in Rendell-Baker she lost. In the first two cases the action claimed to be State action occurred on State-owned property; in the third it occurred on privately owned property. In petitioner's view, the distinction last noted is crucial in explaining the difference in results.

In Burton the Parking Authority had been created by Delaware statute as "a public body corporate and politic, exercising public powers of the State" (365 U.S. at 717; cf. §§ 2 of the New York City Health and Hospitals Corporation Act, App. 12a). In Burton, the Authority's lease to the restaurant contained "no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis" (365 U.S. at 720), although the Court pointed out that in its lease to the restaurant the Authority "could have affirmatively required Eagle [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of State participation" (365 U.S. at 725). In the case at bar, HHC did insert a nondiscrimination clause (§ 5.07) into its affiliation agreement with the Medical College, aimed directly at the latter's employment practices at Metropolitan Hospital.

In Burton the Delaware Supreme Court had held that the restaurant, "in the conduct of its business is acting in a purely private capacity" (365 U.S. at 721). Nevertheless, this Court held:

> The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code §§ 501, 514.
>
> (365 U.S. at 723)

Certainly the same can be said of Metropolitan Hospital!

The Burton Court proceeded:

> The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.
>
> (365 U.S. at 725)

The Burton Court concluded: "the proscriptions of the Fourteenth Amendment

must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself" (365 U.S. at 726).

The only discernible distinctions between Burton and the case at bar tell more strongly in favor of State action than in Burton: (1) the absence of an express discrimination clause in the lease in Burton, contrasted with the presence of such a clause in the affiliation agreement here; (2) in Burton the restaurateur's activity was different from that of the Authority (running a parking garage), whereas here the Medical College was performing the very same activity (running Metropolitan Hospital, hiring and firing its medical staff) that, in the past, the City itself had performed.

In Perry v. Sindermann, the first question presented was whether Professor Sindermann's "lack of a contractual or tenure right

to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments", to which this Court replied: "We hold that it does not" (408 U.S. at 596). After discussing precedents from the previous quarter of a century, this Court concluded: "Thus, [Professor Sindermann's] lack of a contract or tenure 'right' to re-employment for the 1969-70 academic year is immaterial to his free speech claim" (408 U.S. at 597-98).

The Perry Court noted that Professor Sindermann "has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment [against Sindermann] . . . For this reason, we hold that the grant of summary judgment against [Sindermann], without full exploration of this issue, was improper" (408 U.S. at 598).

The only discernible distinction between Professor Sindermann's case and Dr. Konarski's is that the unconstitutional motive which Sindermann alleged was to punish him for exercising a First Amendment right, whereas the one petitioner seeks the opportunity to prove is a Fourteenth Amendment Equal Protection Clause right infringement -- the motive to discriminate against him through termination of employment because of his heterosexuality. This distinction should surely make no Constitutional difference.

Professor Sindermann's employment was on a year-to-year periodically renewable (or nonrenewable) basis, whereas Dr. Konarski's was an employment at will. But Sindermann's nonrenewal became effective at the end of one of his one-year periods, at which point he, too, became an immediately dischargeable employee, for any reason or none, as a matter of State law, just like an employee at will.

Petitioner submits that the combined teaching of Burton and Perry calls for reversal and remand of the judgment below.

In Rendell-Baker v. Kohn, Chief Justice Burger commenced the substantive portion of his Opinion for the Court thus:

> Respondent Kohn is the director of the New Perspectives School, a nonprofit institution located on privately owned property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officers or are chosen by public officials.
>
> (457 U.S. at 831-32 (emphasis added))

Later in his Opinion, distinguishing Burton, he noted that

> The [Burton] Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage.
>
> (457 U.S. at 842-43 (emphasis added))

The two facets of the sentence just quoted will be discussed in turn.

In Burton and in the case at bar, but not in Rendell-Baker, publicly-owned property was the situs of the unconstitutional action under challenge. New York Medical College owns private property in Valhalla, New York, where it maintains and operates the medical college proper. If it were to discharge an employee there, whose employment was not covered by an affiliation agreement(containing a nondiscrimination-in-employment clause) with HHC, such a discharge would raise no constitutional questions, if the employee were one at will. That case would be governed by Rendell-Baker. But New York Medical College has entered into affiliation agreements with HHC under which it operates two municipal hospitals, Lincoln and Metropolitan. In regard to its employment practices on those premises, the Medical College is a State actor, and is governed by Burton and Perry.

The distinction between publicly and privately owned property is of Constitutional dimensions in other areas as well, e.g.,

the Establishment Clause of the First Amendment as it applies to religious activities in or connected with public schools. Cf. Zorach v. Clauson, 343 U.S. 306 (1952)(released time for public school students' religious instruction outside school premises not unconstitutional), with Engel v. Vitale, 370 U.S. 421 (1962)(prayer in public schools unconstitutional, if publicly prescribed and imposed).

The second point in Chief Justice Burger's sentence distinguishing Burton is that Eagle Restaurant's rental payments went to support the garage, and that thus the Parking Authority profited from Eagle's discrimination. Here, of course, the flow of money was in the opposite direction. But the affiliation agreement, like most agreements, was a two-way street. Money flowed from HHC to the Medical College, but, in return, the Medical College relieved HHC and the City of the burden -- which the City had borne in prior years -- of running Metropolitan Hospi-

tal. When the New York State Legislature in 1969 passed the act setting up HHC and authorizing it to enter into affiliation agreements with private entities, it must have thought that such agreements would be advantageous, from HHC's point of view, and HHC itself, when later on it entered into such an agreement with the Medical College, must also have considered it advantageous. Thus it can be said here, as the Court said in Burton, that the allegedly "private" discrimination enures to the profit or advantage of the public entity.

As Rendell-Baker, and Burton itself, point out, a careful sifting of all the facts is needed to draw the line between State and private action in Fourteenth Amendment cases. No mechanical formula will suffice. Petitioner submits that, on any careful sifting of facts in the case at bar, the outcome here should parallel that in Burton and Perry, and that Rendell-Baker is clearly distinguishable.

(2)

IF NEW YORK MEDICAL COLLEGE WAS A STATE ACTOR FOR FOURTEENTH AMENDMENT PURPOSES, DID THE MEDICAL COLLEGE'S DISCHARGE OF PETITIONER, IF MOTIVATED BY DISCRIMINATION AGAINST HIM BECAUSE HE IS A HETEROSEXUAL, VIOLATE THE EQUAL PROTECTION CLAUSE?

Cases alleging discrimination on the basis of sexual orientation have hitherto pitted homosexual discriminatees against heterosexual discriminators. Dr. Konarski appears to be the first heterosexual to bring suit based on reverse sexual-orientation discrimination. Whether cases of ordinary sexual-orientation discrimination, and those of the reverse sort, should be governed by the same principles, is a question of interest, which has scarcely been discussed. It need not, however, be decided in the case at bar.

Even in cases involving homosexual acts, courts have reached discordant results. Cf. Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (no Federal Constitutional privacy right of

homosexuals to engage in private adult homosexual conduct), with People v. Onofre, 51 N.Y. 2d 476, 415 N.E. 2d 936, 434 N.Y.S. 2d 947 (1980)(opposite result under New York State constitution). So it is, perhaps, not surprising to find a similar conflict among courts in cases based on homosexual orientation. Cf. Padula v. Webster, 822 F. 2d 97 (D.C. Cir. 1987), with High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

Both those cases involved claims of discrimination against homosexuals in the noncriminal sphere. The Padula court held that homosexuals are not a suspect class for Equal Protection Clause purposes; the High Tech Gays court held that homosexuals are a quasi-suspect class for the same purposes. Eventually this conflict will be resolved, doubtless by a decision of this Court, but it need not be decided in the case at bar.

For, whatever the right answer may be as to whether civil discrimination against homosexuals is unconstitutional, there can be only one answer as to whether civil discrimination against heterosexuals is unconstitutional. Even under the standard of minimal scrutiny, the rational basis test, such discrimination could not pass muster: it is totally irrational.

It should also be recalled that sexual orientation, as contrasted with sexual acts, has never been made a crime by any legislature. Indeed, if sexual orientation is a status, no legislature could constitutionally make it a crime. Robinson v. California, 370 U.S. 660 (1962). The instant case is about sexual orientation, not about sexual acts.

(3)

ADDITIONAL REASON FOR GRANTING THE WRIT

In the courts below, counsel for New York Medical College made strenuous efforts to refute petitioner's claim that their client was a State actor in the matter at bar, by citing several decisions by trial courts in the New York metropolitan area, none of them reported, which had rejected similar claims in regard to personnel discharged at other municipal hospitals being operated either by their client or by others under similar affiliation contracts with HHC. Appeals had not been taken from the decisions they cited. None of them gave any serious attention to the Equal Protection Clause of the Fourteenth Amendment, or even so much as mentioned Burton, Perry, or the anti-discrimination clause in § 5.07 of the affiliation agreements. If this array of unreproted precedent means what counsel for the Medical College are citing it for, one

discerns a growing disregard by trial courts in the New York area of this Court's teaching in Burton v. Wilmington Parking Authority and Perry v. Sindermann.

A halt should be called. Though the plaintiffs in these other unreported cases did not appeal, Dr. Konarski has appealed in the case at bar, thus giving New York's appellate courts the opportunity to correct this pernicious trend. They did not do so. In consequence, this Court is the only forum left which can.

If this Court is as persuaded of the merits of petitioner's claim as the foregoing arguments would appear to warrant, it need not devote a full opinion, or time for oral arguments, to the case at bar. A simple grant of the writ, reversal and remand for reconsideration in the light of Burton v. Wilmington Parking Authority and Perry v. Sindermann should suffice.

THE RAISING IN THE COURTS BELOW OF THE FEDERAL CONSTITUTIONAL CLAIMS

Equal Protection: State Action

In Petitioner's Pre-Argument Statement filed in the Appellate Division, First Department, dated November 4, 1985, paragraph (9), the following appears:

Nature and Object of the Cause of Action

Damages for wrongful discharge from employment, in violation of Plaintiff-Appellant's rights under the Equal Protection Clause (U.S. Const. Amdt. XIV, § 1; N.Y. State Const. art. 1, § 11) (heterosexual doctor forced out by clique of homosexual physicians).

Plaintiff-Appellant expressly relied upon the "equal protection clause" in his Memorandum in Opposition to the Motion to Dismiss the Complaint and for Summary Judgment (sworn to May 11, 1985), paragraph 3 (p. 2, line 6), in the court below.

(R. 3, 126)

In Plaintiff's Brief in the Appellate Division (pp. 7-8), and in Defendants' Brief (pp. 30-36, and Appendix), as well as in Plaintiff's Reply Brief (pp. 1-3), the State Action issue was debated.

In the Briefs in the Court of Appeals (on the motion for leave to appeal to that court), Plaintiff discussed the State Action issue at pp. 8-10, Defendants at pp. 6-10.

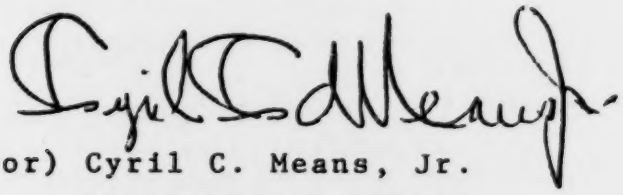
Due Process

This matter was discussed at the deposition of plaintiff, taken at defendants' request, between defendants' counsel and plaintiff, in connection with the latter's assertion that he was entitled to a hearing before being discharged (R. 662-63). It was also referred to in Defendants' papers in support of their motion for summary judgment in the trial court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



(Professor) Cyril C. Means, Jr.
New York Law School
57 Worth Street
New York, N.Y. 10013

(212) 431-2198

Counsel for Petitioner

December 3, 1987.

APPENDIX

MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM, PART I

STANISLAW KONARSKI, M.D., Plaintiff, against NEW YORK MEDICAL COLLEGE, KARL P. ADLER, M.D., PHILIP HENIG, M.D., and KURT ALTMAN, M.D., Defendants.	FILED OCT 7 1985 Index Number 42606/84 Calendar Number 194 of May 31, 1985

MEMO

WOLIN, Eugene R., J:

Plaintiff Stanislaw Konarski, M.D., has brought this action claiming that he was wrongfully discharged from his employment because he is an avowed heterosexual. The defendants now move for summary judgment dismissing the complaint.

Plaintiff commenced employment with the New York City Health and Hospitals Corporation (HHC) in February, 1958, and was assigned to

Metropolitan Hospital. Plaintiff's employment was on a part-time basis and he worked 17½ hours per week in the General Internal Medicine Ambulatory Care Center (Ambulatory Care Center) at the hospital. In 1968 pursuant to an affiliation agreement operation of the hospital was transferred to the defendant New York Medical College (College). As a result, Doctor Konarski became an employee of the College. His part-time employment at Metropolitan Hospital in the Ambulatory Care Center continued until July 1, 1981. In May of that year defendant Karl P. Adler, M.D., the Chief of medicine at Metropolitan Hospital decided upon a reorganization of the Ambulatory Care Center. The emphasis in the reorganization was the assignment of individual patients to particular physicians on a continuing basis. To implement this program a staff of full-time physicians was required. The part-time physicians, such as plaintiff,

could elect either to work full-time or to leave the employ of the hospital. In addition plaintiff concedes that he was offered a comparable part-time position in another department of the hospital. Plaintiff rejected this offer. Plaintiff's employment was then terminated on July 1, 1981. On or about July 1, 1982, plaintiff filed an age discrimination charge against the College with the Equal Employment Opportunity Commission (the Commission). The College responded to this charge and by letter dated November 30, 1982, the Commission informed the College that it was discontinuing processing plaintiff's charge. In June, 1984, plaintiff commenced this action alleging discrimination based upon his sexual preference; fraudulent representations by the College in proceedings before the Commission; fraudulent concealment of the reasons for his termination and breach of contract.

The complaint may be dismissed on several grounds:

First, New York does not recognize a cause of action for wrongful termination of employment in the absence of a written contract of employment (Murphy v. American Home Products, 58 NY2d 293). Plaintiff has produced no written contract but instead seeks to rely upon alleged oral assurances that his employment would be permanent. The rule is clear that where there is no fixed period of employment, the employment is terminable at will by the employer for any reason or for no reason (Murphy v. American Home Products, 58 NY2d 293, supra; Mackie v. La Salle Industries, 92 AD2d 821; Pavolini v. Bard Air Corp., 88 AD2d 714). Plaintiff's reliance upon the affiliation agreements between HHC and the College is misplaced. Nothing in those agreements relates to the terms and conditions of his employment. Nor has plaintiff established reliance upon any other documents or employee manuals (Weiner v. McGraw-Hill, 57 NY2d 458).

Second, at this point in time New York does not recognize a cause of action for discrimination based upon sexual preference (Under 21, Catholic Home Bureau for Dependent Children v. The City of New York, __ NY2d ___, NYLJ, July 5, 1985, P. 17, Col. 1; Rich v. Secretary of the Army, 735 F.2d 1220; De Santis v. Pacific Tel. and Tel., 608 F2d 327). While plaintiff's private sexual practices enjoy a measure of protection from government regulation (People of the State of New York v. Onofre, 51 NY2d 476), that protection has not been extended to eliminate discrimination in the employment practices of private industry.

Third, even if such a cause of action existed plaintiff has not established any basis for his claim of discrimination. In essence plaintiff claims that his position at the hospital was undermined by, and his employment subsequently terminated by a "homosexual clique." Plaintiff offers no

admissible evidence as to the sexual orientation of the individual defendants, relying instead upon his own feelings and inferences. One colleague on the staff of the hospital is thought to be homosexual because he has frequently been heard to complain about his wife. Even assuming that conclusive proof on the question may be difficult to obtain the court should not construe pleadings so liberally as to allow stuff and nonsense to state a cause of action. Nor should the court permit discovery which would be both purposeless and an unwarranted intrusion upon individual privacy.

Fourth, plaintiff has not established any reliance upon the representations made by the College at the proceedings before the Commission. In his deposition plaintiff has stated that he never believed the reasons proffered by the College. Without proof of reliance plaintiff cannot succeed on any claim of fraudulent misrepresenta-

tion or fraudulent concealment (JoAnn Homes at Bellemore v. Dworetz, 25 NY2d 112; Channel Master Corp. v. Aluminium Ltd. Sales, 4 NY2d 403).

Fifth, as to any breach of contract plaintiff has failed to establish any agreement by defendants to pay him at any fixed rate. Plaintiff was an employee at will and there is no duty on his employer to deal with him fairly or in good faith (Murphy v. American Home Products, 58 NY2d 293). Thus the mere fact that other physicians in part-time positions may have been paid at a higher rate does not, without more, establish a cause of action for breach of contract.

Finally, even if the allegations were proven the individual defendants would not be liable to plaintiff for interference with his contract of employment (Mackie v. La Salle Industries, 92 AD2d 821, supra; Manley v. Pandick Press, 72 AD2d 452, app dsmd, 49 NY2d 981; Greyhound Corp. v.

Commercial Cas. Ins. Co., 259 App Div 317). Plaintiff may have had an action for defamation against the individual defendants (Milone v. Jacobson, 78 AD2d 548). However, this cause of action must be commenced within one year and would have been time-barred when the present complaint was served.

In the light of the foregoing the motion of the defendants must be granted.

Accordingly, the motion of the defendants for summary judgment dismissing the complaint is granted with costs and disbursements.

Settle order.

October 4, 1985. (s) E.R.W.
J.S.C.

Order appealed from

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York at the Supreme Courthouse, 60 Centre Street, New York, New York, on the 19th day of November, 1985.

P R E S E N T :

Hon. EUGENE R. WOLIN
Justice

STANISLAW KONARSKI, M.D., Plaintiff, against NEW YORK MEDICAL COLLEGE, KARL P. ADLER, M.D., PHILIP HENIG, M.D., and KURT ALTMAN, M.D., Defendants.	Index No. 42606/84 ORDER

Defendants New York Medical College, Karl P. Adler, M.D., Philip Henig, M.D., and Kurt Altman, M.D., having moved this Court by notice of motion pursuant to CPLR R3211 and R3212, for an order granting defendants summary judgment dismissing the complaint herein, and defendants' motion having duly

come on to be heard on May 31, 1985, and plaintiff having appeared by his attorney, Ronald J. L. Jackson, Esq., in opposition to defendants' motion, and defendants having appeared by its attorneys, Kelley Drye & Warren by Richard S. Order, in support of defendants' motion, and due deliberation having been had, and the Court having rendered its decision in writing dated October 4, 1985,

NOW upon reading and filing the notice of motion dated March 22, 1985 with proof of service thereof, the affirmation of Richard S. Order dated March 22, 1985 with exhibits attached thereto, the affidavit of Karl P. Adler, M.D., sworn to on March 21, 1985 with exhibits attached thereto, the affidavit of Philip Henig, M.D., sworn to on March 21, 1985, the affidavit of Kurt Altman, M.D., sworn to on March 21, 1985, the transcript of the deposition of plaintiff taken September 21, 1984 and October

19, 1984 as filed with the Clerk of the Court, the affidavit of Stanislaw Konarski, M.D., sworn to May 11, 1985 in opposition to the motion, the affirmation of Ronald J. L. Jackson dated May 14, 1985 with exhibits attached thereto, in opposition to the motion, the reply affirmation of Richard S. Order dated May 30, 1985 with exhibits attached thereto, the reply affidavit of Karl P. Adler, M.D., sworn to May 30, 1985, the reply affidavit of Marc Weinberger sworn to on May 30, 1985 with exhibit attached thereto, and all the other papers filed heretofore, it is

ORDERED that defendants' motion for an order pursuant to CPLR R3211 and R3212 for summary judgment dismissing the complaint herein is granted with costs and disbursements, and it is further

ORDERED that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

E N T E R :

(s) E.R.W.

J.S.C.

FILED

NOV 26 1985

COUNTY CLERK'S OFFICE
NEW YORK

Order of affirmance, without opinion, by the Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 7, 1987

Present--

Hon. Theodore R. Kupferman,
Justice Presiding,
Hon. Joseph P. Sullivan,
Hon. John Carro,
Hon. Betty Weinberg Ellerin,
Hon. George Bundy Smith,
Justices.

Stanislaw Konarski, M.D., Plaintiff-Appellant, against New York Medical College, Karl P. Adler, M.D., Philip Henig, M.D., and Kurt Altman, M.D., Defendants-Respondents.	29667

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Eugene Wolin, J.), entered on November 26, 1985, and said appeal having been argued by

William J. Dowling, Jr., of counsel for the appellant, and by Sarah L. Reid and Sandra K. Rotter, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Order by the Appellate Division, First Department, denying motion for leave to appeal to the Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 9, 1987

Present--

Hon. Theodore R. Kupferman,
Justice Presiding,
Hon. Joseph P. Sullivan,
Hon. John Carro,
Hon. Betty Weinberg Ellerin,
Hon. George Bundy Smith,
Justices.

Stanislaw Konarski, M.D., Plaintiff-Appellant, against New York Medical College, Karl P. Adler, M.D., Philip Henig, M.D., and Kurt Altman, M.D., Defendants-Appellants.	)	M-2012 (29667)

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on April 7, 1987,

Now, upon reading and filing the papers

with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied, with $20 costs.

ENTER:

HAROLD J. REYNOLDS
Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of September, A.D. 1987,

PRESENT,

HON. SOL WACHTLER, Chief Judge, presiding.

1-10	Mo. No. 783
Stanislaw Konarski, M.D., Appellant, vs. New York Medical College, Inc., et al., Respondents.	

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

(s) Stuart M. Cohen

Stuart M. Cohen
Deputy Clerk of the Court

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK

ANNOTATED

Book 65

Unconsolidated Laws

§§ 6401 to 8580

With Annotations
From
State and Federal Courts
and
State Agencies

(1979)

ST. PAUL, MINN.
WEST PUBLISHING CO.

CHAPTER 5—NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Sec.

[1] Section enacted without catchline which has been supplied by editor.
[2] So in original. Probably should be "section".

Library References

Hospitals ⇐2 et seq.
Mechanics' Liens ⇐1, 20.

C.J.S. Hospitals § 4.
C.J.S. Mechanics' Liens §§ 1 et seq., 17.

§ 7381. Short title

This act [1] may be cited as the "New York city health and hospitals corporation act".

L.1969, c. 1016, § 1 [§ 1].

[1] Sections 7381 to 7406.

§ 7382. Declaration of policy and statement of purposes

It is hereby found, declared and determined that the provision and delivery of comprehensive care and treatment of the ill and infirm, both physical and mental, are of vital and paramount concern and essential to the protection and promotion of the health, safety and welfare of the inhabitants of the state of New York and the city of New York.

There are serious shortages in the number of personnel adequately trained and qualified to provide the quality care and treatment needed. A myriad of complex and often deleterious constraints and restrictions place a harmful burden on the delivery of such care and treatment. Technological advances have been such that portions of the health and medical services now delivered by the city are not as advanced as they should be. A system permitting legal, financial and managerial flexibility is required for the provision and delivery of high quality, dignified and comprehensive care and treatment for the ill and infirm, particularly to those who can least afford such services.

It is further found, declared and determined that hospitals and other health facilities of the city are of vital and paramount concern and essential in providing comprehensive care and treatment for the ill and infirm, both physical and mental, and are thus vital to the protection and the promotion of the health, welfare and safety of the people of the state of New York and the city of New York.

There are inadequate general and specialized health care facilities including but not limited to nursing homes and related laboratories and ambulatory care clinics and centers and diagnostic treatment centers. The inadequacy and shortage of health facilities derives from such factors among others as the rapid technological changes and advances taking place in the medical field. These changes and advances have created the need for substantial structural and functional changes in existing facilities. Many of the health facilities of the city are overcrowded. Buildings are deteriorating and many suffer harm as a result of piecemeal and uncoordinated additions. The facilities available for education,

research and development are inadequate to meet the demands of the medical field. Procedures inherent in the administration of health and medical services as heretofore established obstruct and impair efficient operation of health and medical resources.

It is found, declared and determined that in order to accomplish the purposes herein recited, to provide the needed health and medical services and health facilities, a public benefit corporation, to be known as the New York City health and hospital corporation, should be created to provide such health and medical services and health facilities and to otherwise carry out such purposes; that the creation and operation of the New York city health and hospitals corporation, as hereinafter provided, is in all respects for the benefit of the people of the state of New York and of the city of New York, and is a state, city and public purpose; and that the exercise by such corporation of the functions, powers and duties as hereinafter provided constitutes the performance of an essential public and governmental function.

L.1969, c. 1016, § 1 [§ 2].

§ 7383. Definitions

As used or referred to in this act,[1] unless a different meaning clearly appears from the text:

1. "Administrator" or "Health service administrator" shall mean the administrator of health services of the city of New York.

2. "Administration" shall mean the health services administration of the city of New York.

3. "Board" shall mean the board of directors of the corporation as such board is constituted pursuant to section four of this act.[2]

4. "Bonds" and "notes" shall mean bonds and notes respectively, authorized and issued by the corporation pursuant to this act.[1]

5. "City" shall mean the city of New York.

6. "Comptroller" shall mean the comptroller of the city of New York.

7. "Construction" shall mean site acquisition, planning, design, erection, building, alteration, reconstruction, renovation, improvement, extension, enlargement, replacement or modification and the inspection or modification thereof.

terms for years and liens thereon by way of judgments, mortgages, or otherwise.

16. "Reimbursement allowance" shall mean any money paid by any government, or any agency or subdivision thereof or by a social services district or by any private institution or organization or person including, but not limited to, payments authorized by and made pursuant to the federal social security act [4] and the state social services law, to the corporation for the costs of health and medical services furnished to beneficiaries thereof provided by the corporation directly or through agreement with the city.

17. "State" shall mean the state of New York.

18. "Subsidiary corporation" shall mean a corporation created pursuant to subdivision twenty of section five of this act.[5]

19. "Non-profit hospital" shall mean an organization authorized by law to provide health and medical services, organized exclusively for charitable purposes on a non-profit basis, which does not devote more than an insubstantial part of its total activities to activities not in furtherance of its charitable purposes, does not participate or intervene (including publishing or distributing statements), directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office, and no substantial part of the activities of which is devoted to attempting to influence legislation by propaganda or otherwise and no part of the net earnings of which inures to the benefit of a private shareholder or individual.

L.1969, c. 1016, § 1 [§ 3]; amended L.1976, c. 724, § 14.

[1] Sections 7381 to 7406.

[2] Section 7384.

[3] Pub.L. 89-749, Nov. 3, 1966, 80 Stat. 1180. For classification, see U.S.C.A. Tables volume.

[4] 42 U.S.C.A. 301 et seq.

[5] Section 7385.

Historical Note

1976 Amendment. Subd. 11. L. 1976, c. 724, § 14 eff. July 24, 1976, substituted references to "director of management and budget" for "director of the budget".

§ 7384. New York city health and hospitals corporation

1. A corporation, to be known as the "New York city health and hospitals corporation," is hereby created. Such corporation shall be a body corporate and politic constituting a public benefit corporation. It shall be administered by a board of directors consisting of sixteen members, constituted as follows: five di-

§ 7384-a. Corporation as a political subdivision [1]

For the purposes of sections one hundred seventy-five (a)[2] and one hundred seventy-five (b)[3] of the state finance law, the corporation shall be deemed to be a political subdivision.

L.1969, c. 1016, § 1 [§ 4-a], added L.1970, c. 58.

[1] Section enacted without catchline which has been supplied by editor.
[2] So in original. Probably should be "one hundred seventy-five a".
[3] So in original. Probably should be "one hundred seventy-five-b".

§ 7385. General powers of the corporation

The corporation shall have the following powers in addition to those specifically conferred elsewhere in this act: [1]

1. To sue and be sued;

2. To have a seal and to alter the same at its pleasure;

3. To adopt, alter, amend or repeal by-laws or rules or regulations for the organization, management, and regulation of its affairs;

4. To borrow money and to issue negotiable notes, bonds or other evidences of indebtedness and to provide for the rights of the holders thereof in accordance with the provisions of this act; [1] provided, however, that the corporation shall not issue bonds, notes or other evidences of indebtedness for the construction of a health facility without the prior approval of the mayor and, in the case of major construction, without first submitting to the mayor a written statement of the chairman of the board stating that the corporation has consulted with the New York State housing finance agency and the New York State health and mental hygiene facilities improvement corporation [2] with respect to such major construction.

5. To make and to execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes;

6. To acquire, by purchase, gift, devise, lease or sublease, and to accept jurisdiction over and to hold and own, and dispose of by sale, lease or sublease, real or personal property, including but not limited to a health facility, or any interest therein for its corporate purposes; provided, however, that no health facility or other real property acquired or constructed by the corporation shall be sold, leased or otherwise transferred by the corporation without public hearing by the corporation after twenty days public notice and without the consent of the board of estimate of the city;

7. To operate, manage, superintend, and control any health facility under its jurisdiction and to repair, maintain and otherwise keep up any such health facility; and to establish and collect fees, rentals or other charges, including reimbursement allowances, for the sale, lease or sublease of any such health facility, subject to the terms and conditions of any contract, lease, sublease or other agreement with the city;

8. To provide health and medical services for the public directly or by agreement or lease with any person, firm or private or public corporation or association, through and in the health facilities of the corporation and to make rules and regulations governing admissions and health and medical services; and to establish and collect fees and other charges, including reimbursement allowances, for the provision of such health and medical services; and to provide and maintain continuous resident physician and intern medical services; and to sponsor and conduct research, educational and training programs;

9. To provide, maintain and operate an ambulance service to bring patients to or remove them from any health facility of the corporation, and to adopt a schedule of appropriate charges and to provide for the collection thereof;

10. To determine, in accordance with standards established by the administration, the conditions under which a physician may be extended the privilege of practicing within a health facility under the jurisdiction of the corporation, and to promulgate reasonable rules and regulations for the conduct of all persons, physicians and nurses within any such facility;

11. To employ officers, executives, management personnel, and such other employees who formulate or participate in the formulation of the plans, policies, aims, standards, or who administer, manage or operate the corporation and its hospitals or health facilities, or who assist and act in a confidential capacity to persons who are responsible for the formulation, determination and effectuation of management policies concerning personnel or labor relations, or who determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment.

All such personnel shall be excluded from collective bargaining representation.

12. To employ such other employees as may be necessary and except as otherwise provided herein to promulgate rules and regulations relating to the creation of classes of positions, po-

sidiary corporation subject to the provisions of this act [1] and to any agreement entered into pursuant thereto; provided, however, that each such subsidiary corporation shall be subject to any restrictions, approvals, and limitations to which the corporation may be subject;

21. To do any and all things necessary, convenient or desirable to carry out its corporate purposes, and for the exercise of the powers given to it in this act.[1]

L.1969, c. 1016, § 1 [§ 5]; amended L.1969, c. 1017.

[1] Sections 7381 to 7406.
[2] Now the Facilities Development Corporation, see section 4404.
[3] Now known as the Facilities Development Corporation Act, see sections 4401 to 4417.
[4] May 26, 1969.
[5] Section 7401.

Historical Note

1969 Amendment. Subd. 20, par. (a). L.1969, c. 1017, eff May 26, 1969, in sentence beginning "The board of" inserted "except in the case of the Harlem Hospital Center or the new Harlem Hospital Center".

§ 7386. Relationship to the city; agreements concerning health facilities

1. (a) The city shall on or before the first day of July nineteen hundred seventy enter into an agreement or agreements with the corporation, pursuant to this section and section seven [1] herein, whereby the corporation shall operate the hospitals then being operated by the city for the treatment of acute and chronic diseases, and for the fiscal year of the city commencing on the first day of July nineteen hundred seventy and thereafter the city shall include in its expense budget an appropriation of tax levy for the services provided by the corporation and pay the corporation an amount which shall not be less than one hundred seventy-five million dollars; provided, however, that for the fiscal year beginning July first, nineteen hundred seventy-two and thereafter the amount shall be adjusted annually to take account of increases in the cost of health care as reflected in increases in the average rates of reimbursement set by the state pursuant to section twenty-one hundred seven of the public health law [2] for health and hospital services in New York City, and changes in the volume of services rendered by the corporation and required by the city for which no reimbursement from third-party sources is available. The corporation shall submit a program budget to the city, in time for inclusion in the mayor's executive

budget, detailing the anticipated expenditure of the tax levy funds appropriated by the city for the coming fiscal year.

The provisions of subdivision three of paragraph a of section 135.00 of the local finance law shall not apply to a contract entered into pursuant to this section.

1. (b) [3] Within a reasonable time thereafter the city shall enter into a similar agreement or agreements for the remaining personal health and medical facilities then operated by the city.

2. (a) The corporation shall have the power to enter into contracts, leases, sub-leases or other agreements permitting the city to purchase, lease, sub-lease or otherwise acquire or use any health facility by or under the jurisdiction of the corporation; and to permit the city to construct or add health facilities or improvements upon or to such health facility.

(b) The city shall be empowered to purchase, lease, sub-lease or otherwise acquire or contract for the use of and use any health facility held by or under the jurisdiction of the corporation, or to construct or add health facilities or improvements upon or to such a health facility, in accordance with the terms of any contract, lease, sub-lease or other agreement entered into pursuant to the terms of this act.[4]

3. Any contract, lease, sub-lease or other agreement between the city and the corporation for the purchase, lease, sub-lease, use, operation or construction and equipment of a health facility, as authorized by this act,[4] shall

(a) set forth any health facility to be constructed and equipped, used or operated;

(b) provide that the corporation shall apply for and receive all reimbursement allowances or other moneys available to the corporation from any source for the provision of health and medical services for which such reimbursement allowances or other moneys are available, through or in the facilities of the corporation, and that such reimbursement allowances or other moneys shall be collected and received by the corporation directly from any such source, and used by the corporation for the purposes herein recited;

(c) provide that whenever the city requires the corporation to provide health and medical services to persons in the city, the city shall pay the corporation for the cost of such services as are actually rendered, such cost to be determined by agreement between the city and the corporation; provided, however, that such payments shall only be made by the city to the extent that no re-